QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2021 SKQB 232**

Date: **2021 08 27**
Docket: QBG 590 of 2016
Judicial Centre: Regina

BETWEEN:

LORNE PIETT

PLAINTIFF

- and –

GLOBAL LEARNING GROUP INC.,
ROBERT LEWIS, WENDY LEWIS,

GLOBAL LEARNING TRUST SERVICES INC.,
ESTATE OF RON KNECHTEL,
ESCROW AGENT INC.,
IDI STRATEGIES INC., RICHART GLATT, JACK KESLASSY,
JAMES PENTURN,
JDS CORPORATION, DENIS JOBIN,

INFOSOURCE, INC., MICHAEL WERNER,

INTERNATIONAL CHARITY ASSOCIATION NETWORK (ICAN),
NORMAN SILVER, trustee of THE MILLENNIUM CHARITABLE FOUNDATION,

MICHAEL BARRINGTON, CANADIAN INTERNATIONAL TECHNOLOGY TRAINING
INITIATIVES INCORPORATED,
EVANS & EVANS, INC., MICHAEL EVANS,
RICHARD EVANS,
WISE, BLACKMAN LLP,
RICHARD WISE,
BDO CANADA LLP formerly BDO DUNWOODY,

BAKER & MCKENZIE LLP,
CASSELS BROCK & BLACKWELL LLP,
FASKEN MARTINEAU DUMOULIN LLP,

GOWLING WLG (CANADA) LLP formerly GOWLING LAFLEUR HENDERSON LLP,
MORRIS KEPES WINTERS LLP,
ALLAN BEACH,

CANADA REVENUE AGENCY

DEFENDANTS

Brought Under *The Class Actions Act,* SS 2001, c C-12.01

Counsel:

E.F. Anthony Merchant, Q.C. and Anthony Tibbs for the plaintiff, Lorne Piett

Margaret Waddel and Waddel Phillips for Global Learning Group Inc.

Stephen Turk for Robert Lewis

Tavengwa Runyowa for Wendy Lewis

Richard Glatt for IDI Strategies Inc.

Michael Beefort and Neil Rabinovitch for James Pentum

Adam Dewar for Michael Barrington

Gregory Thompson, Q.C. and Caroline Smith for Evans and Evans Inc., Richard Evans and Michael Evans

Gregory Jaycock and Brenda Tsukishima for Wise Blackman LLP and Richard Wise

Alan D'Silva, Daniel Murdoch and Alexander DeParde for BDO Canada LLP

Rahool Agarwal, Terrence O'Sullivan and Meghan Blom for Baker & McKenzie LLP

Shara Roy, Peter Griffin, Ian MacLeod and Amy Sherrard for Cassels Brock Blackwell LLP

Peter Wardle and Jesse Gardner for Gowling WLG (Canada) LLP formerly Gowling Lafleur Henderson LLP

Christopher Wirth and Michael Tersigni for Morris Kepes Winters LLP

Jeffrey Leon, Ranjan Agarwal and Gannon Braulne for Allan Beach and Fasken Martineau Dumoulin LLP

Brooke Sittler, Anne Jinnouchi and David Culleton for Canada Revenue Agency

Margaret Waddell for the plaintiffs in the Ontario action

JUDGMENT RE: CERTIFICATION McCREARY J.
August 27, 2021

TABLE OF CONTENTS

A. OVERVIEW

[1] The present applications, for certification and to substitute the proposed representative plaintiff, are brought in a proposed multi-jurisdictional class action commenced in Saskatchewan under *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*].

[2] This action was commenced in 2016 by Lorne Piett as the proposed representative plaintiff [*Piett Action*].

[3] I have determined that the *Piett Action* should not be certified as a class action. This is because: (1) the *Piett Action* is an abuse of process; (2) neither of the proposed representative plaintiffs are suitable to represent the interests of the class; and (3) an Ontario proceeding, *Lynn Wintercorn v Global Learning Group Inc.* [*Ontario Action*], which has been certified as a national class proceeding, is the preferable vehicle for addressing class members' claims.

[4] As the *Piett Action* is an abuse of process, I am striking the claim in its entirety.

[5] My reasons follow.

B. SUMMMARY OF PROPOSED PROCEEDING

[6] The *Piett Action* relates to a charitable donation program known as the Global Learning Gifting Initiative Charitable Donation Program [Gift Program], which operated for a decade between 2004 and 2014.

[7] The Gift Program was sold as a tax shelter. Taxpayers applied to be capital beneficiaries of a trust that distributed educational courseware. If accepted, taxpayers donated cash and courseware to registered charities. In exchange, they

received two charitable giving tax receipts: one for the cash; the other for the courseware. Ultimately, Canada Revenue Agency [CRA] disallowed all the tax credits related to the Gift Program that were claimed by donors.

[8] The class members in this proposed class action are individuals who participated in the Gift Program by making cash donations and claiming charitable tax credits based on the value of their cash and in-kind donation receipts. The class definition proposed in the amended notice of application is:

> All persons who on or after January 1st, 2004, in exchange for a monetary contribution, received donation receipts in respect of the Global Learning Gifting Initiative tax shelter from any of the following entities:
>
> [list of entities omitted]
>
> And who subsequently had one or more donation tax credits denied by Canada Revenue Agency, respecting the Global Learning Gifting Initiative program, excluding the Defendants, their employees, agents, assigns, parent or subsidiary or affiliated companies, family members, and any person or entity who provided services to one or more of the Defendants in respect of the creation, promotion, marketing, sale or defence of the Global Learning Gifting Initiative.

[9] The *Piett Action* alleges that, among other things, the defendants participated in the sale or marketing of the Gift Program by providing opinions, advice and appraisals, all the while knowing that the Gift Program was a sham.

C. FACTS

[10] The representative plaintiff, Mr. Piett, and a proposed representative plaintiff, Randy Shoeman, filed affidavits in respect of the certification application and the application to substitute Mr. Shoeman as the representative plaintiff. Both Mr. Piett and Mr. Shoeman were cross-examined on those affidavits prior to the certification

hearing. Their evidence from the affidavits and their cross-examinations, as well as replies to undertakings, forms the evidentiary record in this proceeding.

1. The GLGI Program

[11] The Gift Program was promoted by the defendant, Global Learning Group Inc. [GLGI] as a tax shelter. GLGI relied on sales agents or "fundraisers" [sales agents] who marketed and sold the Gift Program like a mutual fund or other financial product. The sales agents received commissions from the cash donations made by their clients to the Gift Program. (Transcript of the cross-examination of Randy Shoeman, held on October 10-11, 2019 [Shoeman Transcript] at p. 101).

[12] Under the Gift Program, taxpayers applied to be capital beneficiaries of a trust that distributed educational courseware. If accepted, taxpayers donated cash and courseware to registered charities and received two charitable giving tax receipts in exchange: one for the cash; the other for courseware. The courseware donation receipts were typically for much more than the taxpayers' cash donations. Ultimately CRA disallowed all the GLGI tax credits claimed by donors.

[13] GLGI relied on a network of sales agents who marketed and sold the Gift Program. Sales agents received a commission from the donations of their clients, which was usually between 24% to 30% of the donation.

[14] In 2015, the Tax Court of Canada found that the GLGI program was a sham, with deceitful and fraudulent elements: *Mariano v Canada*, 2015 TCC 244 at paras 84-89, [2016] 1 CTC 2132.

2. The Representative Plaintiff(s)

[15] Mr. Piett was a donor to the Gift Program and a sales agent of the Gift Program. As a sale agent, Mr. Piett earned commissions from selling the Gift Program to other donors. His commissions ranged between 15% to 30% of donations sold.

[16] Randy Shoeman was also a donor and sales agent of the Gift Program. He also earned commissions from his sales of the program to donors. Mr. Shoeman was a "head fundraiser" of the Gift Program, recruiting other sales agents. Head fundraisers had written contracts with GLGI and received higher commissions, as well as commissions from sales made by their "sub-agents". (Shoeman Transcript at pp. 310-312).

[17] As sales agents, Mr. Piett and Mr. Shoeman sold the Gift Program to their clients and profited from their clients' donations. (Transcript of the cross-examination of Lorne Piett, held September 16 and 17, 2019 [Piett Transcript], Consolidated Applications Record [CAR] at Tab 306, p. 158).

[18] The proposed class definition excludes sales agents. Both Mr. Piett and Mr. Shoeman were sales agents.

[19] Mr. Piett participated as a donor to the Gift Program between 2004 and 2006. He ceased participating in the Gift Program after he was reassessed by CRA in 2007. In 2011, Mr. Piett commenced a proceeding against CRA in the Federal Court, *Scheuer v Canada*, 2015 FC 74, [2015] 2 CTC 135 [*Scheuer Action*], alleging that CRA had failed to warn participants about the Gift Program. Mr. Piett recruited most of the plaintiffs in that proceeding from his client-base. Nevertheless, Mr. Piett continued selling the Gift Program to his clients until 2013, when the Gift Program was discontinued. (Piett Transcript, CAR at Tab 306, p. 89).

[20] In the *Piett Action*, Mr. Piett pleads that the Gift Program was a fraud and asserts that the cash donations made by donors are subject to a constructive trust and should be returned to class members. However, Mr. Piett refuses to return the commissions he received for selling the Gift Program, taking the position that they were earned for "services provided" (Piett Transcript, CAR at Tab 306, pp. 174 and 175).

[21] Mr. Piett has been named as a defendant in at least four Ontario claims for contribution and indemnity as a result of his role in selling the Gift Program and has been noted for default by at least one party. (Piett Transcript, Exhibit 19).

[22] Mr. Piett is also named as a defendant in a counterclaim brought by Wendy Lewis in the *Piett Action*. Plaintiffs' counsel is defending Mr. Piett in various claims commenced against him. Plaintiffs' counsel has refused to voluntarily disclose any details of that retainer, including whether class funds are being used to pay Mr. Piett's defence costs. (Brief of Responses to Undertakings and Other Questions at the Cross-Examination of Lorne Piett, held on September 16 and 17, 2019 at p. 37 [Piett Undertakings]).

[23] Mr. Shoeman participated as a donor in the Gift Program between 2004 and 2007 but ceased participating in the Gift Program after he was reassessed by CRA in 2007. He continued to sell the Gift Program to his clients until approximately 2013, when the program was discontinued. He received commissions of 30% to 42% from the sales of the Gift Program, as well as further commissions from the sales of his agents. (Shoeman Transcript, p. 7, 195, 198, 201, 257, 426 and 493-494).

[24] The commissions Mr. Piett and Mr. Shoeman received from selling the Gift Program far exceed what they paid to the Gift Program as donors. Mr. Piett donated $13,000 in cash, but earned at least $150,000 in commissions between 2004 and 2008,

as well as some commissions thereafter. Mr. Shoeman donated $165,000 in cash but earned approximately $3 million in commissions. (Piett Transcript, CAR at Tab 306, pp. 146-147, 158 and 161-163; Shoeman Transcript, pp. 168-171 and 220-221; Affidavit of Randy Shoeman, sworn September 10, 2019, Exhibit 9).

[25] Mr. Shoeman has admitted that he is "technically insolvent" and does not know how he would pay any adverse costs award in this proceeding (Shoeman Transcript, pp. 283-284 and 425).

[26] Mr. Shoeman has also been sued for contribution and indemnity regarding the claim and the overlapping class action in Ontario. Mr. Shoeman has not defended these actions and has been noted in default by at least one party (Shoeman Transcript, pp. 279-280; and 375-377, Exhibit 7).

3. The *Scheuer Action*

[27] Before this proceeding commenced, Mr. Piett was one of 122 individuals who commenced the *Scheuer Action* against Canada and CRA, in which they asserted that CRA and, through it, the Crown, owed them a private law duty of care. The defendants brought a motion to strike that claim as disclosing no reasonable cause of action, and it was litigated to the Federal Court of Appeal.

[28] The allegations asserted against CRA in the *Scheuer Action* are similar to those asserted against CRA in this action, the *Piett Action*. Specifically, it is asserted in the *Piett Action* and was asserted in the *Scheuer Action*, that CRA did not warn the donors in a timely manner about its concerns respecting the Gift Program. The Federal Court of Appeal held in *Canada v Scheuer*, 2016 FCA 7, [2016] 3 CTC 174 [*Scheuer Appeal*] that there was no private law duty of care binding CRA and that "the performance of statutory duties does not generally give rise to private duties of care"

(para. 46). However, the court noted that liability might be established in the event that there had been an exercise of statutory duties in bad faith or some other improper fashion.

[29] The *Scheuer Action* was struck out by the Federal Court, with leave to amend the claim with particulars of any allegations of bad faith or impropriety: *Scheuer Appeal* at paras 44 and 46. The claim was not amended, and it appears that the action has been abandoned.

4. The Steering Committee and the Fee Arrangement

[30] Ryan Mitchell was formerly an executive with GLGI. When working for GLGI, he was entitled to minimum compensation of $1.5 million per year (Piett Transcript, Exhibit C, Further Fresh as Amended Statement of Claim (*Mitchell v Lewis*) (Ontario) at para. 17).

[31] In or around 2015, Mr. Mitchell formed a steering committee to commence and direct the *Piett Action*. The steering committee consisted of himself, Mr. Piett and Mr. Merchant, who is plaintiffs' counsel. The steering committee agreed that Mr. Piett would serve as the representative plaintiff for the class proceeding, and would be compensated for doing so. (Piett Transcript, CAR at Tab 306, pp. 219-220 and 246-249; Shoeman Transcript, pp. 257 and 268).

[32] The steering committee instructs plaintiffs' counsel in this proceeding. However, when questioned, Mr. Piett was unaware of the details of those instructions. (Piett Transcript, CAR at Tab 306, pp. 219-220 and 249).

[33] Mr. Mitchell is a defendant to a related claim for contribution and indemnity brought by Cassels Brock & Blackwell LLP, which is a defendant in the

Ontario Action. Mr. Mitchell defended that claim. His defence notes that he was not named as a defendant in the *Piett Action*. On cross-examination, Mr. Piett agreed that the steering committee would not instruct Mr. Merchant to commence a claim against Mr. Mitchell. (Piett Transcript, CAR at Tab 309, pp. 127-128). Mr. Shoeman implied that Mr. Mitchell would need to be consulted first. (Shoeman Transcript, p. 315).

[34] The steering committee solicited funds from Gift Program donors for the proposed class proceeding through two websites that Mr. Mitchell established called *Merchant Law Helps* and *Donors4Donors*. (Shoeman Transcript, p. 259).

[35] The steering committee entered into an agreement with Mr. Mitchell to obtain the donor list available to him through his work at GLGI in order to solicit individuals to join the class of the *Piett Action*. In addition, the steering committee contracted with Mr. Mitchell to create the websites and marketing materials, and to handle communications for both *Merchant Law Helps* and *Donors4Donor*s. (Piett Transcript, CAR at Tab 308, pp. 36 and 55; Shoeman Transcript, p. 259).

[36] Through *Donors4Donors*, Mr. Mitchell used GLGI's mailing list of donors to ask for an "initial non-refundable payment of $500 per donor" towards this class action litigation. In addition, Gift Program sales agents were recruited by *Merchant Law Helps* and *Donors4Donors* to solicit their Gift Program clients to participate in the proposed class action and to contribute $500 each. (Piett Transcript, CAR at Tab 308, pp. 209-215 and 218-219; Piett Undertakings, attachments).

[37] Prior to the hearing of the certification application, plaintiffs' counsel received approximately $1.7 million from Gift Program participants solicited through *Merchant Law Helps* and *Donors4Donors*. Subsequently most of those funds were distributed to Mr. Mitchell, Mr. Piett and Mr. Shoeman. Mr. Piett testified that he

received approximately $100,000. Mr. Shoeman testified that he received approximately $25,000. These monies were paid to them as referral fees for recruiting donors to pay the non-refundable $500 per person fee to plaintiffs' counsel [Fee Arrangement] (Piett Transcript, CAR at Tab 308, pp. 51, 61, 65, and 70; Piett Undertakings, pp. 40-42; Shoeman Transcript, pp. 257-258; Piett Transcript, CAR at Tab 306, pp. 217-219; Shoeman Transcript, p. 257).

[38] Plaintiffs' counsel, as counsel for the putative class, refused to answer questions about its involvement in *Merchant Law Helps* and *Donors4Donors.* Plaintiffs' counsel also refused undertaking requests to obtain information from Mr. Mitchell and would not consent to an examination of Mr. Mitchell.

[39] References from the *Merchant Law Helps* website suggest that the website was operated or approved by plaintiffs' counsel, although this is not confirmed by plaintiffs' counsel. The website displayed the following:

> a) The home page is a letter "From the Desk of Tony Merchant Q.C.";
>
> b) The policy page includes plaintiffs' counsel's contact information and a copyright notice that reads, "All rights reserved © 2015 Merchant Law Group LLP";
>
> c) The FAQ's repeatedly refer to plaintiffs' counsel, information about class actions, and information about plaintiffs' counsel.
>
> (Piett Transcript, CAR at Tab 306, pp. 209-212 and 223-225; Shoeman Transcript, pp. 259-263, Exhibit 8).

[40] The *Merchant Law Helps* website suggested that class members who did not pay $500 would receive less information than class members who did contribute. The website's FAQ's states:

> **Will I not be represented in this action as well?**
>
> You help this action only if you decide to sign-up and get behind Merchant Law. Remember, Merchant Law's class action is *a completely separate action with separate claims* (e.g. "failed duty of care") very different from the claims GLGI's lawyers are fighting in court. This class action is for donors by donors against CRA for their failure to warn donors and lookout for them.
>
> …
>
> **What if I don't do anything?**
>
> You can choose to do that, however, we wouldn't recommend that you decide to "put all your eggs in one basket" (i.e. back a single course of action). In effect, you are betting that GLGI's legal action will proceed smoothly to a successful conclusion. That's it. You have no back-up plan. Now take a moment to consider the position you would be putting yourself in, if you decide to back-up your position by contributing to Merchant Law's class action. Effectively, then you would be backing both cases, two different legal approaches (i.e. two different statement of claims-one refuting CRA's contention with GLGI's tax shelter program was a sham (the case put forward by GLGI's lawyers) and one case (Merchant Law's case) hinging on CRAs alleged failed "duty of care" (i.e. they failed to warn donors in a reasonable amount of time that they considered the GLGI tax shelter program to be invalid). All things considered, we think having a sound back-up plan in place is the best way to go. Merchant Law can win even if GLGI loses!
>
> …
>
> **If I don't participate in the class action, will I be included in the outcome?**
>
> Technically yes. The law is that a class certification makes everyone automatically a class member who meets the class description – which will also be determined by a judge. However, you will be much less aware of the stage of progress of the class action and will be entirely dependent on the notice provided by the court to know when and how

> to make your claim. Court notice is good, but studies of class action have shown that many people don't get notice and subsequently don't make any claims under settlements.
>
> More importantly, your participation is crucial to allowing this action to go forward. When we go before a judge and say 2,000 people have not only signed up, but paid $500, that is impactful. That lets the judge know that people care about this, that there is a real sense among many people that a significant injustice has taken place.
>
> [Shoeman Transcript, Exhibit 8]

[41] The *Merchant Law Helps* website also explained, as follows, how donors' contributions to the class action in question would be managed and spent:

> - "Legal fees will be paid from these funds according to the hourly rates of the lawyers who work on the file";
>
> - "… this payment is a non-refundable contribution towards the payment of legal fees to Merchant Law Group in advancing class litigation on behalf of Global Learning participants against Canada Revenue Agency";
>
> - "These funds will be held in a trust account, from which legal services will be billed. A Statement of Account will be sent via email or regular mail to the address provided by the payer when amounts are billed from the trust account".
>
> (Shoeman Transcript, Exhibit 8)

[42] However, the majority of the donors' contributions were used to pay Mr. Piett, Mr. Shoeman, and Mr. Mitchell, not for legal fees as stated on the *Merchant Law Helps* website. No statement of account was sent to any donor showing the payments from plaintiffs' counsel's trust account.

[43] While plaintiffs' counsel refused most requests for documents or information relating to the Fee Arrangement, plaintiffs' counsel did disclose that:

- Over 3500 class members each made a $500 contribution;

- In January 2016, plaintiffs' counsel reported to Mr. Piett that it had received $1,280,309.03;

- In March 2016 and May 2016, plaintiffs' counsel sent cheques totaling $440,000 to Mr. Piett's numbered company;

- Plaintiffs' counsel paid itself at least $368,728.51 for legal fees and disbursements prior to the certification hearing;

- At least $1.34 million was paid to Mr. Piett's numbered company for work performed by Mr. Piett, Mr. Mitchell, and "a number of individuals who are class group leaders for their contact work" (none of whom are lawyers or providing legal services);

- Mr. Mitchell invoiced plaintiffs' counsel for $373,239 between September 2015 and April 2016;

- Mr. Piett invoiced plaintiffs counsel for $221,000 in consulting services between September 2015 and November 2015 and December 2015 and January 2016,

which were in addition to the other amounts paid to Mr. Piett;

- Mr. Piett testified he received a finder's fee of around "$100 per client" and "likely $100,000" in total; and

- Mr. Shoeman testified he received a finder's fee of $200 for each class member he successfully solicited for this class action and $50 for each class member successfully solicited by his sub-agent. Mr. Shoeman says he received $25,000 in total, but refused to produce any supporting documents.

(Affidavit of Alex Kepic, sworn November 3, 2018, Exhibit D; Shoeman Transcript, pp. 257-258, Exhibit 8; and Piett Transcript, CAR at Tab 306, pp. 218-219, 225-229 and 239-240).

5. *The Ontario Action*

[44] On June 26, 2019, the Ontario Superior Court of Justice certified the *Ontario Action* as a national class proceeding against GLGI, Global Learning Trust Services Inc. as the Trustee of Global Learning Trust (2004), Robert Lewis, IDI Strategies Inc., JDS Corporation, Escrowagent Inc., James Penturn, Richard E. Glatt, Denis Jobin, Allan Beach, Fasken Martineau DuMoulin LLP, Cassels Brock & Blackwell LLP, Wise Blackman LLP and Evans & Evans Inc.: Order of Justice Belobaba dated June 26, 2019, re: Certification.

[45] The *Ontario Action* was settled against JDS Corporation and Denis Jobin.

[46] The *Piett Action* overlaps in large measure with the *Ontario Action* and both proceedings relate to the same subject matter.

D. ISSUES

[47] The central issue in this complex proceeding is whether the court should certify this action as a class action. Arising from this issue are the following sub-issues:

a) Is the plaintiff's claim an abuse of process requiring the claim to be dismissed?

b) Should leave be granted to substitute Mr. Shoeman as the representative plaintiff? Are either Mr. Piett or Mr. Shoeman suitable representative plaintiffs?

c) Is the *Piett Action* preferable to other reasonably available means of resolving the claims of the class members, including the *Ontario Action*?

i) Does the *Piett Action's* claim against CRA disclose a reasonable cause of action, thereby distinguishing it from the *Ontario Action*?

ii) Is the *Ontario Action* otherwise preferable?

[48] There are also a number of summary judgment applications filed by various defendants seeking to have the *Piett Action* dismissed against them individually. Because I have found that the *Piett Action* should be struck in its entirety as an abuse of process, it is unnecessary for me to deal with the remaining outstanding summary judgment applications.

E. ANALYSIS

1. The *Piett Action* is an Abuse of Process

[49] Class actions are an important and powerful tool for securing justice within Canada. If the process is abused by litigants or by legal counsel, then the administration of justice is brought into disrepute. Courts are to be especially vigilant in denouncing a course of conduct that is shown to undermine the objectives of class actions: *Drover v BCE Inc.*, 2013 BCSC 1341 at paras 45-57, [2014] 4 WWR 554; *Drover v BCE Inc*., 2013 BCSC 50 at paras 43, 51-52, and 62, 43 BCLR (5th) 146; *Ammazzini v Anglo American PLC*, 2016 SKCA 164 at paras 70-75, 405 DLR (4th) 119 [*Ammazzini*]*; Boehringer Ingelheim (Canada) Ltd. v Englund*, 2007 SKCA 62 at paras 33, 38 and 41, [2007] 9 WWR 434 [*Englund*]; *Bear v Merck Frosst Canada & Co.*, 2011 SKCA 152 at paras 74-78, [2012] 6 WWR 1 [*Bear*]; and *Bancroft-Snell v Visa Canada Corp*, 2016 ONCA 896, 133 OR (3d) 241.

[50] In my view, the evidence adduced in this case demonstrates that the background conduct of the litigation giving rise to the *Piett Action* constitutes an abuse of process. Mr. Piett, Mr. Shoeman, and others have undermined the integrity of the class actions adjudicative process by advancing this litigation to the certification stage for an improper purpose: to profit from the class members that they purport to represent.

[51] The class actions process is intended to provide access to justice. However, Mr. Piett, Mr. Shoeman and a third party, Mr. Mitchell, have subverted that process to enrich themselves, without disclosing their enrichment to class members and without seeking approval from the court for their Fee Arrangement. They have also created a two-tiered structure for class members – where those who pay to participate may get more information than those who do not. All of this is improper.

[52] Generally, there is no single, specific marker which demonstrates that an action is an abuse of process. Rather, it is necessary to consider "all of the relevant context and background" to assess whether an abuse of process is established: *Bear* at para 41.

[53] The doctrine of abuse of process focuses on the integrity of the adjudicative process and is aimed at preventing "misuse of the courts": *Englund* at para 33. The Court of Appeal has accepted four categories of proceedings as abuse of process: *Englund* at para 41. These are:

> a) Proceedings which deceive the court, or are fictious or constitute a sham;
>
> b) Proceedings where the process of the court is not being fairly or honestly used, but is employed for some ulterior or improper purpose or in an improper way;
>
> c) Proceedings that are manifestly groundless or without foundation or which serve no useful purpose; and,
>
> d) Multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

[54] In a class action, if the defendant demonstrates that the plaintiffs' claim is an abuse of process, then the plaintiff does not have a reasonable possibility of success and it is plain and obvious that the claim cannot succeed: *Bayens v Kinross Gold Corp.*, 2013 ONSC 6864 at paras 43-44; and *Ross v Canada (Attorney General)*, 2018 SKCA 12 at para 37, [2018] 5 WWR 669 [*Ross*].

[55] The following evidence demonstrates that the conduct of the *Piett Action* was focussed on creating profit for the *Piett Action's* promoters at the expense of class members, resulting in an abuse of process:

> a) Mr. Mitchell, a former senior executive of GLGI, Mr. Piett and plaintiffs' counsel established a steering committee to drive the *Piett Action*. Through the steering committee it was decided that Mr. Piett would be the representative plaintiff and Mr. Piett agreed to be the representative plaintiff on the condition that he be financially compensated for doing so;
>
> b) Mr. Mitchell created the websites, *Merchant Law Helps* and *Donors4Donors,* in order to solicit class members to pay a retainer to plaintiffs' counsel to participate in the class action, without court approval;
>
> c) The content of the *Merchant Law Helps* website was created or approved by plaintiffs' counsel;
>
> d) Mr. Mitchell used a list of donors from his work for the defendant, GLGI, to contact potential class members;
>
> e) If putative class members did not pay $500, they were advised that they would be "technically" part of the class action, but would receive less notice and information about the proceeding. This created a two-tiered structure for class members, where those who paid to participate had greater access to information than those who did not pay, violating

> the purpose and intent of the *CAA* and specifically s. 6(1)(ii);
>
> f) Mr. Shoeman and Mr. Piett "sold" participation in the class action to class members for a finder's fee and these recruited putative class members were the same donors to whom they had sold the Gift Program;
>
> g) The $500 fee solicited from putative class members (which total approximately $1.7 million) was largely used to pay finder's fees and/or consulting fees to Mr. Piett, Mr. Shoeman, and Mr. Mitchell. The money was not used primarily for legal fees as it was stated it would be on the *Merchant Law Helps* website;
>
> h) Plaintiffs' counsel did not seek the court's approval of the Fee Agreement, but did pay itself for legal fees and disbursements;
>
> i) No statements of account were sent to class members showing the payments from plaintiffs' counsel's trust account; and,
>
> j) Plaintiffs' counsel would not have commenced the *Piett Action* but for the Fee Arrangement: Piett Undertakings at para. 153.

[56] It is also noteworthy that all this evidence was discovered by defendants' counsel through the cross-examinations of Mr. Piett and Mr. Shoeman. None of these

facts were first disclosed to the court by the plaintiff. A court may draw an adverse inference where it is shown that a party selectively disclosed documents or information, or refused to provide information: *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3. Critically, plaintiffs' counsel did not apply to the court for approval of the solicitation of putative class members or the Fee Arrangement, which would have provided disclosure of that Fee Arrangement to the court.

[57] I am mindful of the fact that I am required to certify the *Piett Action* as a class action if I am satisfied that, *inter alia*:

> a) A class action would be the preferable procedure for the resolution of the common issues; and,
>
> b) There is a person willing to be appointed as a representative plaintiff who: (i) would fairly and adequately represent the interests of the class; (ii) who has a workable plan for advancing the claim on behalf of the class and for notifying class members; and (iii) who does not have, on the common issues, an interest that is in conflict with the interests of other class members: *CAA*, s. 6(1)(d)-(e).

[58] However, while it is the responsibility of the representative plaintiff to have a workable litigation plan which includes a plan to inform class members, the court is vested with the broad authority to supervise aspects of that plan. The court must approve any enforceable agreement respecting fee arrangements between a representative plaintiff and legal counsel. This authority is provided to the court to ensure that the best interests of class members are protected. With leave of the court, notices to the class may include a solicitation of contributions from class members to

assist in paying lawyer's fees and disbursements: *CAA*, s. 22(2). An agreement respecting fees and disbursements between a lawyer and a representative plaintiff is not enforceable unless approved by the court, on the application of counsel: *CAA*, s. 41(2).

[59] Plaintiffs' counsel argues that provisions of the *CAA* which prohibit class solicitation for fees without court approval only applies **after** a class action is certified. The argument is that prior to certification there are no "class members", just putative class members, and therefore, prior to certification, s. 22(2) of the *CAA* does not apply.

[60] Respectfully, I do not agree. It is illogical and incongruous with the spirit and intent of the *CAA,* which is designed, in part, to protect the interests of class members, for the legislation to apply only after an action is certified as a class action. As noted by Justice Belobaba in *McCallum-Boxe v Sony*, 2015 ONSC 6896 at para 15 [*McCallum-Boxe*], the purpose of legislation which provides for judicial oversight over plaintiffs' costs is to ensure that the interests of the class are not prejudiced:

> **[15]** Judges should as a rule approve legal fee arrangements that incentivize class counsel to press for the highest possible recovery for the class and should reject arrangements such as this that encourage premature, sub-optimal settlements negotiated by class counsel trying to extract an almost risk-free payment for themselves.

[61] Judicial oversight must therefore be in place from the conception of the litigation.

[62] The two funding schemes set up through *Merchant Law Helps* and *Donors4Donors* have generated approximately $1.7 million from putative class members. As noted, Mr. Piett received approximately $100,000 through the funding scheme and Mr. Shoeman received approximately $25,000. Mr. Mitchell, who is not a party to the action, received hundreds of thousands of dollars. All of these payments were received before the action in question even proceeded to a certification hearing.

None of these arrangements were approved under s. 41(2) of the *CAA,* and it is unlikely that they would be. It was necessary for plaintiffs' counsel to seek approval of any solicitation of contributions from individuals who would be class members. This did not happen, and therein lies one aspect of the impropriety.

[63] In addition to violating the requirement for court approval, the funding scheme devised by Mr. Piett, Mr. Mitchell and plaintiffs' counsel is contrary to the purpose and objectives of the *CAA*. As Justice Belobaba described in *McCallum-Boxe*, inappropriate funding schemes disincentivize counsel and representative plaintiffs from striving for advantageous settlements on behalf of the class. They incentivize ill-conceived class actions. This brings the administration of justice into disrepute and is an abuse of process.

[64] I find that Mr. Mitchell's activities in relation to this action are akin to maintenance. To be liable for maintenance, an individual must intervene "officiously or improperly", such as where a non-party "wilfully and improperly stirs up litigation and strife" by providing financial assistance to a litigant. If a non-party resembles a maintainer, it is an abuse of process: *Young v Young*, [1993] 4 SCR 3 (WL) at para 265; and *1318847 Ontario Ltd. v Laval Tool & Mould Ltd*., 2017 ONCA 184 at para 75, 134 OR (3d) 641.

[65] Mr. Mitchell is a non-party to this action. He is a member of the steering committee that purportedly instructs plaintiffs' counsel in this class action. Through the *Merchant Law Helps* website and *Donors4Donor*s, Mr. Mitchell has received finder's fees of approximately $373,000 for soliciting class members to pay $500 each to plaintiffs' counsel. It is key that these individuals already had the right to participate in the class action, pursuant to the *CAA*, without paying any retainer. Because Mr. Mitchell worked for GLGI he cannot be a class member. However, it appears that, to date, Mr.

Mitchell has received more money from this prospective class action than has any class member.

[66] Superior Courts have an inherent jurisdiction to control their proceedings to prevent interference with the proper administration of justice and to dismiss an action if the circumstances warrant and the claim is otherwise an abuse of process: *The Queen's Bench Rules*, Rule 7-9. As an abuse of process, the *Piett Action* has no reasonable possibility of success. As a result, the application for certification is dismissed and the *Piett Action* is struck in its entirety.

2. Neither Mr. Piett Nor Mr. Shoeman are Suitable Representative Plaintiffs

[67] While I have found that the *Piett Action* is an abuse of process, in the event that I am incorrect, I have also considered whether the application for certification otherwise meets the requirements of s. 6(1) of the *CAA*. The outstanding issue is whether the proposed representative plaintiff(s) are suitable pursuant to the factors set out at s. 6(1)(e)(i) to (iii) of the *CAA*.

[68] I find that Mr. Piett is not a suitable representative plaintiff for the proposed class action. In addition, Mr. Shoeman is similarly unsuitable and should not be substituted as the representative plaintiff.

[69] A representative plaintiff must be a member of the class asserting claims against the defendant. This means that the representative plaintiff "must have a claim that is a genuine representation of the claims of the members of the class" or must be capable of asserting a claim on behalf of all class members as against the defendant(s): *Pederson v Saskatchewan (Ministry of Social Services)*, 2016 SKCA 142 at para 100, [2017] 5 WWR 669 [*Pederson*].

[70] Whether the representative plaintiff can provide adequate representation depends on, *inter alia*: their motivation to prosecute the claim, their ability to bear the costs of the litigation, and the competence of their counsel to prosecute the claim. The representative plaintiff should be able to "instruct counsel and exercise independent judgment" respecting the notable issues that will arise throughout the litigation: *Pederson* at para 100.

[71] The representative plaintiff has the responsibility to prosecute the lawsuit, once certified, in the interests of the class members. For this reason, the representative plaintiff's duty to the class is akin to that of a fiduciary duty. The representative plaintiff is responsible for the adequate performance of his or her obligations and the representative plaintiff's duties "cannot be delegated to another party who is not answerable to the court": *Hoffman v Monsanto Canada Inc.*, 2007 SKCA 47 at para 91, [2007] 6 WWR 387.

[72] As a result, the representative plaintiff must be genuine, not a placeholder or a "string-puppet of an entrepreneurial champertous class counsel": *Sondhi v Deloitte Management Services LP*, 2018 ONSC 271 at para 44:

> **[44]** While the court should be sceptical of the defendant's attacks against the qualifications of the representative plaintiff; the court must nevertheless ensure that the proposed representative plaintiff is not a string-puppet of an entrepreneurial champertous class counsel. The proposed representative plaintiff must be a genuine plaintiff with a real role to play and not a placeholder plaintiff recruited to cater to the entrepreneurial interests of class counsel. A proposed representative plaintiff must demonstrate autonomy and a minimum level of general knowledge about the nature of the class proceedings and his or her responsibilities to give instruction on behalf of the class. Thus, while not necessarily a disqualifying factor, the recruitment of the plaintiff is a relevant factor to be considered in determining whether the proposed representative plaintiff has the necessary interest,

> independence, and incentive to fulfil his or her duties to the class members.
>
> [Footnotes omitted]

[73] At any stage of the action, the court may grant leave to add, remove or substitute a party. Leave is to be given on any terms the court considers just, unless prejudice will result that cannot be compensated for by costs or an adjournment: *The Queen's Bench Rules*, Rule 3-84(2).

[74] In this case, Mr. Piett's application to substitute Mr. Shoeman as the proposed representative plaintiff is not a typical application for amendment because, from its inception, this action was to be treated as a class action: *Holmes v Jastek Master Builder 2004 Inc.*, 2007 SKQB 242 at para 5, 308 Sask R 156 [*Holmes*].

[75] Given the distinct nature of class proceedings, there must be a "cogent reason" for seeking to withdraw as the representative plaintiff. The court must approve the plaintiff's withdrawal and such approval hinges on a number of factors including, but not limited to, whether the class proceeding has been commenced for an improper purpose, whether there is a viable replacement so putative class members will not be prejudiced, the prejudice to the defendant(s), and whether the proposed replacement is prepared to accept the exposure to costs consequences: *Holmes* at para 5, citing *Logan v Canada (Minister of Health)*, 2003 CanLII 20308 (Ont Sup Ct), aff'd (2004), 71 OR (3d) 451 (Ont CA).

[76] Neither Mr. Piett nor Mr. Shoeman has provided a cogent reason for Mr. Piett's withdrawal. Mr. Piett's explanation is: "I have time requirements and other businesses that I do not have the flexibility to put into this as a plaintiff": Piett Transcript, CAR at Tab 306, p. 33. This reason, without any other detail, is insufficient to support Mr. Piett's withdrawal.

[77] However, Mr. Piett's reason for his resignation is not entirely determinative of the issue. This is because neither Mr. Piett nor Mr. Shoeman is a suitable representative plaintiff.

[78] It is uncontroverted that Mr. Piett and Mr. Shoeman were both subcontractors of GLGI. They were each sales agents in the middle and upper-levels of the sales structure of the Gift Program. They promoted the Gift Program to individuals encompassing the class. They were enriched by GLGI when they received commissions for selling the Gift Program to individuals who are now putative class members.

[79] It has also been shown that Mr. Piett and Mr. Shoeman continue to have a relationship with Mr. Mitchell, the former managing director of GLGI. Mr. Piett and Mr. Shoeman worked with Mr. Mitchell to create a structure surrounding this proposed class action, from which they profited financially. I have found that their actions, including their involvement in the Fee Structure, constitute an abuse of process. They have profited from the same class members whose best interests they are supposed to represent.

[80] In addition, Mr. Piett and Mr. Shoeman are both unsuitable representative plaintiffs because their relationship with GLGI is fundamentally different than most other class members' relationship with GLGI. This is because Mr. Piett and Mr. Shoeman received commissions from GLGI and profited from the Gift Program by receiving commissions from their clients' class donations as well as their own cash donations; other members of the class simply realized a loss.

[81] Further, as a result of the advisor/client relationship between Mr. Piett, Mr. Shoeman and their clients – who are the putative class members – it is possible that a client/advisor fiduciary duty may arise between Mr. Piett/Mr. Shoeman and a class

member. Such a relationship is fundamentally different from the relationship between the vast majority of class members.

[82] Finally, both Mr. Piett and Mr. Shoeman have been named as defendants in a number of claims for contribution and indemnity relating to the Gift Program. This puts them in a situation where they may experience greater benefit personally if the class fails. Clearly this is a disqualifying conflict.

[83] The representative plaintiff and the proposed class cannot have a conflict respecting the common issues. Mr. Shoeman could not recall during his cross-examination that he had been the sales agent for *Ontario Action* plaintiff Emily Flammini. Ms. Flammini's evidence was given in the *Ontario Action* in support of allegations of fraud and conspiracy that are captured in the proposed common issues in the *Ontario Action*. Mr. Shoeman's evidence does not support those allegations. While the test is no longer "success for one must mean success for all", the Supreme Court has held that success for one class member must not result in failure for another class member: *Vivendi Canada Inc. v Dell'Aniello,* 2014 SCC 1 at paras 42-46, [2014] 1 SCR 3. As stated by the Ontario Court of Appeal in *McCracken v Canadian National Railway Co.*, 2012 ONCA 445 at para 83, 111 OR (3d) 745: "The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation in the same manner, to each member of the class".

[84] In summary, Mr. Piett and Mr. Shoeman are demonstrably unsuitable to lead the action because:

a) They are each in conflict with other members of the class:

i) They each earned substantial commissions from the sale of the Gift Program to class members;

ii) They each may be liable for some or all of the class members' losses. Some defendants have sued Mr. Shoeman and other sales agents for contribution and indemnity; and

iii) Mr. Shoeman's interests specifically conflict with one of the four representative plaintiffs in the *Ontario Action* – Emily Flammini, who is Mr. Shoeman's former client.

b) Mr. Piett and Mr. Shoeman were both paid to solicit class members to join this class action;

c) Mr. Shoeman cannot bear the costs of the litigation because he is insolvent; and,

d) Mr. Shoeman was noted in default in the contribution claims started in Ontario. He, therefore, admits all allegations against him in Ontario, including that he contributed to the class members' losses.

[85] This all begs the question as to why Mr. Piett or Mr. Shoeman would attempt to be appointed representative plaintiff in this action. It appears their motive was to profit further from class members who paid to join the action, or to pursue equitable remedies to which they would otherwise not be entitled. This is inequitable and I find that they are both unsuitable pursuant to ss. 6(1)(e)(i) and (iii) of the *CAA*.

[86] While the court has the authority to appoint a person who is not a member of the class as the representative plaintiff for the class action, this should only be done where it is necessary to avoid a "substantial injustice" to the class, such as where a class suffers from a legal disability, has a particular vulnerability or needs "special consideration": *CAA*, s. 4(4*); Brooks v Canadian Pacific Railway Ltd.*, 2007 SKQB 247, [2007] 11 WWR 436; and *Cantlie v Canadian Heating Products Inc*., 2017 BCSC 286.

[87] In my view, there is no evidence whatsoever of a "substantial injustice" to support appointing a representative plaintiff who is not a member of the class. Evidence of substantial injustice is a precondition to such extraordinary relief. There is no evidence that the putative class in question suffers from a legal disability, nor has any particular vulnerability, nor needs "special consideration": *Elder Advocates of Alberta Society v Alberta*, 2008 ABQB 490 at paras 545-548, [2008] 11 WWR 70; aff'd 2009 ABCA 403, rev'd on other grounds, *Elder Advocates of Alberta Society v Alberta*, 2011 SCC 24, [2011] 2 SCR 261 [*Elder SCC*].

[88] In addition, there is no substantial injustice to class members generally because class members are all members of the *Ontario Action*. Counsel has not identified any legal authority for appointing a non-class member as representative plaintiff where there is another, certified overlapping class action. As a result, I find that there is no reason to allow or to substitute a representative plaintiff who is not a member of the class.

[89] Finally, this is not an appropriate case to give leave to allow plaintiffs' counsel to find a new representative plaintiff, given that I have found the *Piett Action* is an abuse of process, and the *Ontario Action* is the preferable procedure to advance the interests of the class.

3. The *Ontario Action* is the Preferable Procedure

a. Principles of Preferability

[90] Finally, I have considered whether the *Piett Action* should be certified in light of the *Ontario Action's* certification and the provisions of s. 6(2) of the *CAA*.

[91] I find that the *Ontario Action* is the preferable procedure for resolution of the class members' claims.

[92] Preferability is founded on two concepts. The first is whether the class action will be a fair, efficient and manageable method for advancing the claim. The second is whether the class action will be preferable to other reasonably available methods of resolving the claims of class members, such as joinder, tests cases, and consolidation. The preferability analysis requires the court to consider all reasonably available means of resolving class members' claims: *Ross* at para 75; *AIC Limited v Fischer*, 2013 SCC 69, [2013] 3 SCR 949.

[93] If a multi-jurisdictional class action has been commenced elsewhere in Canada that involves the same or similar subject to the action being considered, then the court must determine whether it would be preferable for some or all of the proposed class members' claims, or common issues raised by those claims, to be resolved in that class action: *CAA*, s. 6(2).

[94] In making a determination pursuant to s. 6(2) of the *CAA*, the court must take into account:

> a) The interests of all the parties in each of the relevant jurisdictions;

b) The aims of justice;

c) That it is important to avoid, where possible, the risk of irreconcilable judgments; and

d) Promoting judicial economy.

[95] The court is also required to consider all relevant factors, which include, but are not limited to (*CAA*, s. 6(3):

a) The alleged basis of liability, including applicable laws;

b) The stage each of the actions has reached;

c) The plan for the proposed multi-jurisdictional class action, including the viability of the plan and the capacity and resources for advancing the action on behalf of the proposed class;

d) The location of the representative plaintiffs and class members in the various actions, including the ability of representative plaintiffs to participate in the actions and to represent the interests of the class members; and,

e) The location of evidence and witnesses.

[96] A certification judge has an independent obligation to decide if it is preferable for claims or issues raised in a class action to be resolved in another class action. In doing so, the court must first determine whether the overlapping actions

involve the same or similar subject matter. The court must then consider s. 6(3)'s objectives and factors in coming to a decision: *Ammazzini* at paras 52-53.

[97] Plaintiffs' counsel argues that: (a) the Saskatchewan courts may disregard s. 6(2) of the *CAA* and consider certification of the *Piett Action* "irrespective of the Ontario [Action] *Wintercorn* certification"; and (b) the court maintains "no residual discretion not to certify if the certification criteria are satisfied" and must "unconditionally certify". With respect, I do not agree.

[98] The Saskatchewan Court of Appeal in *Ammazzini* found that the wording of s. 6(2) of the *CAA* ("the court **shall** determine whether it is preferable" [emphasis added] makes it clear that the certification judge is under an "independent obligation" to consider the question of preferability *vis-à-vis* any other existing multi-jurisdictional class action on the same subject, notwithstanding any considerations: *Ammazzini* at paras 52-53 and at para. 71.

[99] I am mindful of the rationale underlying the provisions in s. 6 of the *CAA* – the principle that the existence of two or more multi-jurisdictional actions in Canada that encompass the same claims "leads to the prospect of complication, greater expense, delay, inefficiency, and risk of conflicting decisions": *Ammazzini* at para 30. This is to be avoided when it is reasonably possible to do so.

[100] Considering the mandate of s. 6 of the *CAA* by focussing on the interests of class members in Canada generally, rather than specifically on Saskatchewan residents, because the *Ontario Action* is already certified there is a strong presumption against certifying the *Piett Action* in respect of the same claims.

[101] Nevertheless, there is one substantive difference between the claims in Ontario and Saskatchewan. In the *Piett Action,* Mr. Piett has named additional

defendants, all of whom (if they have responded to the action) challenge certification of the class action against them. Further, the primary target in the Saskatchewan action, which differs from the *Ontario Action*, is CRA. If the claim against CRA is viable, this may distinguish the *Piett Action* from the *Ontario Action* so substantially as to justify certifying this second action.

[102] However, I have found that the claim against CRA in the *Piett Action* is untenable because it discloses no reasonable cause of action. As a result, the *Piett Action* does not stand apart in any meaningful way from the *Ontario Action*.

b. CRA Claim Discloses No Cause of Action

[103] In relation to the certification application, CRA has argued that the application for certification brought against it should be dismissed as disclosing no reasonable cause of action against CRA. As I said, I agree with CRA that Mr. Piett's claim against it discloses no reasonable cause of action.

[104] A brief review of the facts relating to Mr. Piett's claim against CRA is necessary.

[105] The *Canada Revenue Agency Act*, SC 1999, c 17, establishes CRA, as an agent of Her Majesty the Queen in Right of Canada. CRA is responsible for supporting the administration and enforcement of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*]. The Minister of National Revenue [Minister] administers and enforces the *ITA* and is responsible for CRA.

[106] The Canadian system for the collection of income tax is self-assessing and self-reporting: *R v Jarvis*, 2002 SCC 73 at paras 49-51, [2002] 3 SCR 757.

[107] The *ITA* prohibits any person from selling, issuing or accepting consideration in respect of a tax shelter unless the Minister has issued an identification number for the tax shelter. CRA assigned a tax shelter identification number to the Gift Program in 2004.

[108] The *ITA* requires a tax shelter promoter referring to a tax shelter identification number in writing to include a warning that "issuance of the identification number is for administrative purposes only and does not in any way confirm the entitlement of an investor to claim any tax benefits associated with the tax shelter": *ITA*, s. 237.1. The tax shelter identification number is for identification purposes only and does not guarantee the tax benefits promised by the tax shelter: *Scheuer Action* at para 40.

[109] Mr. Piett and Mr. Shoeman both participated in the Gift Program as donors. They both claimed charitable donation credits in relation to their participation in the Gift Program and were both reassessed by CRA. Their claims for charitable donation credits were denied within the normal reassessment period.

[110] The *Piett Action* alleges that CRA was negligent because it failed to warn Mr. Piett and other class members that the Gift Program was a sham and because CRA delayed its audit and assessment of class members' tax returns, which caused them personal economic loss. In addition, Mr. Piett claims that CRA owed him a duty of good faith and breached that duty.

[111] Pursuant to s. 6(1)(a) of the *CAA*, it must be plain and obvious that a claim discloses no reasonable cause of action, or has no reasonable prospect of success, before the claim may be struck: *Daniels v Canada (Attorney General),* 2003 SKQB 58 at para 14, 230 Sask R 120. The facts alleged in the claim are assumed to be true for the

purposes of determining whether the pleadings disclose a cause of action: *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras 17 and 22-24, [2011] 3 SCR 45 [*Imperial Tobacco*]*; Hunt v Carey Canada Inc.* [1990] 2 SCR 959 at para 36 (CanLII); *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 15, [2003] 3 SCR 263.

[112] In this case, Mr. Piett's claim does not disclose a reasonable cause of action against CRA because CRA does not owe the plaintiff, or other taxpayers, a private law duty of care to warn of investment schemes that do not accord with the *ITA*. In addition, CRA does not owe a private law duty of care when it exercises its statutory duties under the *ITA*. I find that there is no basis upon which to establish a new duty of care.

[113] For CRA to be liable in negligence, it must owe class members a private law duty of care. To determine whether a duty of care arises, the court asks whether a *prima facie* duty of care arises because the harm suffered by the plaintiff is a foreseeable consequence of the defendant's actions and the relationship between the parties is sufficiently close to ground a duty of care: *Childs v Desormeaux*, 2006 SCC 18 at para 15, [2006] 1 SCR 643 citing *Anns v Merton London Borough Council*, [1978] AC 728 (HL). Even if a *prima facie* duty of care exists, the court must consider whether there are countervailing policy reasons to negate that duty.

[114] However, there is already a considerable body of Canadian legal authority which supports that a private law duty of care does not exist between CRA and taxpayers in circumstances such as Mr. Piett's or Mr. Shoeman's.

[115] For example, in the *Scheuer Appeal*, the Federal Court of Appeal addressed a claim in negligence against CRA in relation to the Gift Program. The court

concluded that the provisions of the *ITA* dealing with the Minister's statutory duties in issuing tax shelter identification numbers precluded tort liability. The court assumed, without deciding, that a proximate relationship existed between the parties in the circumstances but found that residual policy considerations negated any *prima facie* duty of care. Specifically, the court held that to impose a duty of care on CRA would create an insurance scheme for investors at great cost to the taxpaying public. The court also concluded that those who promoted and gave opinions in respect of the tax shelter were better placed to indemnify the plaintiff in the event of negligence in the exercise of their professional responsibilities.

[116] In *Deluca v Canada (Attorney General)*, 2016 ONSC 3865, [2017] 1 CTC 131 [*Deluca*], the Ontario Superior Court similarly addressed a claim in negligence against CRA in relation to a charitable donation tax shelter. Deluca, using proceeds from a loan, acquired "Tradebux", which were donated to a registered charity. CRA audited the charity and disallowed the claimed deductions based upon over-valuation of the donation. CRA also cancelled the registration of the charity associated with the scheme. The claimant alleged that CRA owed him a duty to monitor the registration of the charity in a timely manner and a duty to warn him once it knew of the impropriety of the scheme. The court concluded that CRA did not owe the claimant a duty of care. The losses claimed were not a foreseeable consequence of CRA's failure to police the registration of charities, and there was insufficient proximity to ground a duty of care in the circumstances. The court found that a private law duty of care conflicted with the overall public interest in distributing the burden of taxation across all taxpayers in a manner that is fair and reasonable.

[117] In addition, in *Grenon v Canada (Revenue Agency)*, 2017 ABCA 96, [2017] 6 WWR 146, the Alberta Court of Appeal reviewed existing negligence cases

against CRA involving the assessment and audit of an RRSP trust, concluding that a fresh duty of care analysis was unnecessary. The court concluded that CRA does not owe a duty of care to a taxpayer when administering and enforcing the *ITA*. Insufficient proximity exists to ground a private law duty of care because of the inherent adverse relationship between a taxpayer and an auditor.

[118] While in *Leroux v Canada Revenue Agency*, 2014 BCSC 720, [2014] 6 CTC 71, a British Columbia court determined CRA owed a duty of care to a taxpayer in the course of auditing, this case has been recognized as an outlier. I decline to follow it.

[119] Thus, the vast majority of Canadian case law has established that CRA does not owe taxpayers a duty of care in circumstances similar to this case. This is because, in these circumstances, CRA and a taxpayer do not have a relationship of sufficient proximity to ground a duty of care. The *ITA* does not create, expressly or by implication, a private duty owed to individuals.

[120] Specifically considering the facts in this case, I find that no private law duty of care arises between Mr. Piett and CRA in the circumstances.

[121] First, the harm allegedly suffered by Mr. Piett is not a foreseeable consequence of CRA's failure to warn him that the Gift Program was a sham, or of the time it took to reassess him. The *ITA* does not guarantee that CRA will allow taxpayers the amounts that they claim when filing their returns. On the contrary, the *ITA* authorizes the Minister to audit tax returns and to reassess them. Given the Minister's general and constant authority to disallow a benefit declared by a taxpayer, it is not a foreseeable consequence that a taxpayer may suffer a loss as a result of CRA's failure

to warn the taxpayer about a questionable tax shelter or its delay in reassessing a tax return.

[122] In addition, I find that there is no proximity between the plaintiff and CRA that is sufficient to establish a new private law duty of care in the circumstances. Courts can find a relationship of sufficient proximity when: (1) the relationship is created by statute; or (2) a series of specific interactions between the government entity and the claimant establishes such a relationship: *Imperial Tobacco* at para 43.

[123] In this case, the *Piett Action* does not allege that CRA acted outside its role as a regulator. As such, if proximity exists it must arise from the governing legislation: *Cooper v Hobart*, 2001 SCC 79 at para 43, [2001] 3 SCR 537. "Economic loss will only be recoverable if, as a matter of statutory interpretation, it is the type of loss the statute intended to guard against": *Nielsen v Kamloops (City)*, [1984] 2 SCR 2 at para 91 (WL).

[124] The *ITA* does not impose any private law duties on CRA or the Minister. This suggests that Parliament did not intend to impose a duty on CRA to safeguard the economic interests of any individual who seeks to reduce their tax burden by participating in an investment strategy: *Deluca* at paras 53 and 57; and *Canus Fisheries Ltd. v Canada (Customs and Revenue Agency)*, 2005 NSSC 283 at para 73, 237 NSR (2d) 166. In fact, CRA is granted a broad authority to administer and enforce the *ITA* for the benefit of the public. Where statutory duties are owed to the public there can be no proximity to establish a private law duty: *Leighton v Canada (Attorney General*), 2012 BCSC 961 at para 54, 2012 DTC 5123 [*Leighton*].

[125] The *ITA's* purpose is to raise revenue for public purposes, and to distribute that revenue according to the manner determined by Parliament. The purpose

of issuing charitable registrations and tax shelter identification numbers is to protect the tax base administered by CRA. The structure of the *ITA* cannot be construed as imposing a duty on the Minister or CRA to supervise registered charities with the goal of protecting taxpayers from the risks inherent in investing with them: *Deluca* at para 53.

[126] From a policy perspective, given the *ITA's* purpose, opposing interests necessarily arise between CRA and taxpayers. There can be no duty owed to an individual to protect his or her economic interests where CRA's function is to assess the taxpayer in accordance with the *ITA* in order to protect the tax base for the benefit of the public: *Leighton* at para 54 citing *783783 Alberta Ltd. v Canada (Attorney General),* 2010 ABCA 226 at paras 45-46, [2010] 12 WWR 472; and *Syl Apps Secure Treatment Centre v B.D.*, 2007 SCC 38 at para 32, [2007] 3 SCR 83. A conflict arises if CRA is required to weigh the general public interest in the administration and enforcement of the *ITA* against a duty to protect an individual's economic interests. That conflict is clearly not the intention of Parliament.

[127] Finally, I find that interactions between Mr. Piett and CRA pled in the claim do not rise to the level or type of conduct that is sufficient to establish a "close and direct" relationship of proximity between the plaintiff and CRA in order to give rise to a private law duty of care. To establish proximity based on specific interactions, the plaintiff must show that CRA "through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care.": *Imperial Tobacco* at para 45. If a finding of proximity would conflict with CRA's statutory public duty, no proximity arises, even if specific interactions between the government and the claimant are sufficient to give rise to a private law duty of care: *Imperial Tobacco* at paras 44-45.

[128] From the pleadings, the only interactions between CRA and the plaintiff arise from the reporting, assessment, and reassessment of the plaintiff's income tax returns. There are no specific or direct interactions alleged in the *Piett Action* between the plaintiff and CRA or its officials. Specifically in relation to the plaintiff's argument that the *Taxpayer Bill of Rights* imposes a duty on CRA, the Ontario Court of Appeal held in *Taylor v Canada (Attorney General)*, 2012 ONCA 479 at para 105, 352 DLR (4^{th}) 690, that reliance on public statements cannot, on its own, create a relationship of proximity.

[129] As a result, I find that the public representations pleaded in relation to the *Taxpayer Bill of Rights* do not establish a close and direct relationship between CRA and the plaintiff. The allegations in the claim that CRA should have made more representations and warned taxpayers about questionable tax schemes are allegations of general interactions, which are insufficient to establish a relationship of proximity.

[130] In conclusion, I find that a *prima facie* duty of care owed by CRA to the plaintiff or other taxpayers cannot be established in the circumstances of this case.

[131] Finally, I find that the plaintiff's claim that CRA acted in bad faith cannot survive as an independent cause of action: *De Nicola v Catholic Children's Aid Society of Toronto*, 2019 ONSC 2042 at paras 19-20, 26 RFL (8th) 189, citing *Elder SCC* at para 78*; Kivell v Chatham-Kent Children's Services,* 2016 ONSC 1921 at paras 11 and 101. While the Supreme Court of Canada recognized bad faith as an element of the tort of misfeasance in public office: *Wuttunee v Merck Frosst Canada Ltd.*, 2007 SKQB 29 at para 95, [2007] 4 WWR 309; and *Elder SCC* at para 78, the tort of misfeasance in public office has not been pled by Mr. Piett.

[132] Further, I note that any claim that CRA or the Minister acted in bad faith in exercising its statutory authority is properly grounded in judicial review of the administrative action: *Elder SCC* at para 78. A breach of statute is not a breach of a private law duty of care: *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205; *Holland v Saskatchewan*, 2008 SCC 42, [2008] 2 SCR 551. If CRA fails to act as required by statute, a remedy may be obtained only through judicial review: *Ficek v Canada (Attorney General)*, 2013 FC 502 at para 2, 432 FTR 245; *McNally v Canada (Minister of National Revenue)*, 2015 FC 767, 483 FTR 113; *Wu v Vancouver (City*), 2019 BCCA 23 at para 43, [2019] 9 WWR 565. Thus, if Mr. Piett argues that a breach has occurred because of a delay in assessing or reassessing his tax return, he must seek judicial review to remedy that breach.

[133] For all these reasons, I find that Mr. Piett's claim against CRA is untenable as it discloses no reasonable cause of action. Mr. Piett's claim against CRA is struck.

c. Preferability of the *Ontario Action*

[134] Returning to the issue of the preferability of the *Ontario Action*, generally, the fundamental difference between the *Ontario Action* and the *Piett Action* is that the *Ontario Action* focuses on the liability of professionals versus that of CRA. Given the Federal Court of Appeal's finding in the *Scheuer Action*, and my finding that there is no cause of action against CRA, the *Ontario Action* contains a superior theory of liability and, as a result, is more efficient.

[135] I do note the *Ontario Action* does not name Wendy Lewis as a defendant. Counsel for the *Ontario Action* asserts that Wendy Lewis has not been named as a defendant because the *Ontario Action* asserts a constructive trust over the cash

donations paid by the class for participation in the Gift Program, and seeks a tracing order against GLGI and Robert Lewis, to whom the class members paid their funds, and from whom Wendy Lewis received payments. This is a reasonable course to pursue in the litigation and adequately addresses contribution from Ms. Lewis in the event that liability is found. Thus, the *Piett Action* is not preferable in this regard.

[136] The *Ontario Action* has been certified with the same class definition as is proposed in the *Piett Action*, and with respect to substantially the same causes of action and proposed common issues. Given the same causes of action have already been certified against most of the same defendants, it would defeat the goal of judicial economy to re-certify the same claims on behalf of the same class in a second proceeding. Duplicate actions do not serve the interests of justice or the interests of the class and are procedurally burdensome and unfair to the defendants.

[137] To the extent that the defendants overlap between the two actions, the plaintiffs in the *Ontario Action* and the *Piett Action* have pleaded essentially the same causes of action. However, the more judicious naming of defendants in the *Ontario Action* likely results in a superior analysis of liability and collectability against the defendants.

[138] On the whole, the litigation plan of the *Ontario Action* is preferable. While both class actions deal with similar subject-matter, the proposed common issues in the class action before this Court are substantially different than those certified in the *Ontario Action*. It is not clear that the proposed common issues in this proceeding are necessary to the resolution of each class member's claim. When compared to the *Ontario Action*, the litigation plan in the *Piett Action* fails to explain how the critical and determinative individual issues will be adjudicated: see Certification Order of

Justice Belobaba, dated June 26, 2019; Piett Transcript, Exhibit 15; Affidavit of Lorne Piett, sworn April 20, 2018, Exhibit 94.

[139] Further, the plaintiffs in the *Ontario Action* are funded by the Class Proceedings Fund. Consequently, they have less risk and more resources than either Mr. Piett or Mr. Shoeman. The Class Proceedings Fund provides financial support for legal disbursements and indemnifies plaintiffs in the *Ontario Action* for adverse costs awards.

[140] Considering the current state of each class action, the *Ontario Action* has been certified as against most defendants and is further advanced than the *Piett Action*. I note also that the certification of the *Ontario Action* was by consent, which ensured there was no appeal of the certification order. Less delay in moving toward the common issues trial enhances the class members' access to justice.

[141] Considering the ability of representative plaintiffs to participate in the actions and to represent the interests of class members, I have already found that neither Mr. Piett nor Mr. Shoeman is a suitable representative plaintiff. I note that the *Ontario Action* has four class members who have already satisfied the Ontario court that they will represent the class capably. Those four representative plaintiffs were not sales agents of the Gift Program and have not been found to have any conflict of interest with class members.

[142] Considering the location of the representative plaintiffs and the class members, while Mr. Piett and Mr. Shoeman live in Saskatchewan, they are not class members because they were sales agents of the Gift Program. In the *Ontario Action*, the representative plaintiffs all live in Ontario and are class members within the definition of the class.

[143] Further, the majority of the defendants named in this action operate in Ontario. GLGI, the trust and the principles of those parties are in Ontario. The Gift Program originated in Ontario and was operated out of Ontario. Most of the defendants are Ontario residents or have Ontario offices, including all the lawyer/law firm defendants, and most of the accounting and GLGI defendants. Of those defendants who are not resident in Ontario, none of them are resident in Saskatchewan. Other than the evidence of individual class members, none of the evidence or parties are located in Saskatchewan and most of the evidence and parties are located in Ontario. The close proximity of the defendants and their evidence favours prosecution of the class members' claims in the *Ontario Action*.

[144] Considering the resources and experience of counsel, the consideration of counsel's resources and capabilities under s. 6(3)(b)(iii) of the *CAA* does not usually require the court to engage in detailed fact-finding regarding the respective abilities of competing counsel groups: *Wuttunee v Merck Frosst Canada Ltd.*, 2008 SKQB 229 at paras 33-34, 312 Sask R 265, rev'd 2009 SKCA 43, [2009] 5 WWR 228. However, this is not an absolute rule. For example, in a 2018 Ontario carriage decision, Justice Glustein noted that counsel who continue to replicate behaviours that have already attracted court criticism "raise a legitimate concern as to whether that counsel should be selected to represent the interest of class members": *Agnew-Americano v Equifax Canada Co.*, 2018 ONSC 275 at para 231.

[145] In this case, plaintiffs' counsel:

> a) Accepted fees solicited from putative class members through *Merchant Law Helps* and *Donors4Donors* without court approval;

> b) Required putative class members who agreed to pay the $500 fee to then sign non-retainer agreement documents that specifically disclaim that there is a solicitor-client relationship with plaintiffs' counsel;
>
> c) Disbursed fees paid by putative class members for the prosecution of the proposed class action, without court approval, to pay finder's fees and/or consulting fees to Mr. Piett, Mr. Shoeman and Mr. Mitchell; and,
>
> d) Disbursed fees paid by putative class members to plaintiffs' counsel, without reporting those payments to class members, and without court approval.

[146] This conduct occurs in the context of decisions such as *Strohmaier v K.S.*, 2019 BCCA 388, 30 BCLR (6th) 289 [*Strohmaier*] in which the British Columbia Court of Appeal cited the chamber's judge's finding that "courts have expressed concerns about both MLG's [plaintiffs' counsel in the *Piett Action*] ability or willingness to adhere to court processes and its fidelity to clients as distinct from its own self-interest": *Strohmaier* at para 17, citing *Strohmaier v British Columbia (Attorney General)*, 2018 BCSC 1613 at para 70.

[147] While I need not make a finding that plaintiffs' counsel is not competent to pursue this class action, I find that counsel's conflict arising from its representation of Mr. Piett and Mr. Shoeman versus its duties to class members renders it unsuitable. In short, plaintiffs' counsel is conflicted. Mr. Piett and Mr. Shoeman have previously been clients of plaintiffs' counsel, aside from the *Piett Action*. While plaintiffs' counsel does not stand in a solicitor-client relationship with the class members, there are

important responsibilities imposed on plaintiffs' counsel that are owed to class members: *Fantl v Transamerica Life Canada*, 2009 ONCA 377 at para 38, 95 OR (3d) 767. For example, plaintiffs' counsel has a duty to avoid conflicting interests. A lawyer may not represent a client whose interests are directly adverse to the immediate interests of another current client, even if the two mandates are unrelated, unless both clients consent after receiving full disclosure, and the lawyer reasonably believes that he or she can represent each client without adversely affecting the other: *R v Neil*, 2002 SCC 70 at para 29, [2002] 3 SCR 631.

[148] In class proceedings, there are three types of conflict of interest of concern: (1) conflicts of interest arising from a lawyer's direct financial interest in the class proceeding, which are an inherent conflict allowed by the entrepreneurial model of the class proceedings legislation; (2) conflicts arising from a divergence of interest between the representative plaintiff and class members; and (3) conflicts arising from the lawyer's divided loyalties arising outside the class proceeding: *Persaud v Talon International Inc.*, 2018 ONSC 5377 at para 175.

[149] I find that the Fee Arrangement between Mr. Piett, Mr. Shoeman, Mr. Mitchell and plaintiffs' counsel creates a conflict which gives rise to divided loyalties. Specifically, Mr. Piett and Mr. Shoeman were paid from retainer funds paid by class members, even though they provided no legal services. Their fee was not disclosed to class members. Further, Mr. Piett selected plaintiffs' counsel because plaintiffs' counsel agreed to pay him a finder's fee from class members' retainers. Mr. Piett and Mr. Shoeman participated in misstatements to class members about class members' participation rights and the purpose of the retainer fees. Most significantly, class members may have a claim against Mr. Piett, Mr. Shoeman and Mr. Mitchell because they were sales agents or executives of the Gift Program. However, plaintiffs' counsel

cannot represent class members against Mr. Piett or Mr. Shoeman because counsel acts for Mr. Piett and Mr. Shoeman. Plaintiffs' counsel will not be instructed to act against Mr. Mitchell. The conflict is obvious and untenable.

[150] As such, I find that it is preferable for class members to be represented by class counsel in the *Ontario Action*.

[151] For all the reasons I have given, the *Ontario Action* is preferable.

F. CONCLUSION

[152] In the result, the application for certification of the *Piett Action* is dismissed, as is the application to substitute the representative plaintiff. The *Piett Action* is an abuse of process. As such, it cannot be certified and the claim is struck. Further, neither of the proposed representative plaintiffs are suitable to represent the interests of the class, primarily because their interests conflict with those of class members. Finally, the *Ontario Action* is clearly the preferable vehicle for addressing class members' claims.

[153] The defendants are successful in the certification application, and generally, in relation to the claim as a whole. The defendants shall have their costs. Quantum of costs may be spoken to, at the request of any party.

J.
M.R. McCREARY